Merchants Building Maintenance LLC *and* Elizabeth Castro *and* Axel Carmona. Cases 28–CA–022660 and 28–CA–022882

June 27, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On November 23, 2010, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent and the Acting General Counsel each filed exceptions, a supporting brief, and an answering brief, and the Respondent filed a reply in support of its exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified below, and to adopt the recommended Order as modified.[2]

The Respondent provided janitorial services for school districts and business clients in several western states, including New Mexico. This case involves the Respondent's janitors who were assigned to the Santa Fe School District. The judge found that the Respondent unlawfully refused to rehire 21 of those janitors for the 2009–2010 school year in retaliation for their protected concerted activity during the 2008–2009 school year. We agree with that finding, with the clarifications discussed below.

I. THE REFUSAL TO REHIRE VIOLATION

In reaching her finding, the judge applied the test for refusal-to-hire cases established in *FES*[3] on the assumption that that test, rather than the test articulated in *Wright Line, Inc.*,[4] applies where an employer has refused to rehire former employees. No party has excepted to the judge's decision to apply *FES* or has otherwise raised the question whether the Board instead should apply *Wright Line* to a situation in which the rehiring occurred shortly after the alleged discriminatees left the respondent's employment. Nevertheless, we find that the record fully supports the judge's unfair labor practice finding under either test.[5]

With respect to the Respondent's knowledge of the discriminatees' protected activity, we note the judge's finding that the Respondent on two occasions unlawfully threatened employees through its supervisor, Oscar Arellano, that they would not be rehired for having engaged in protected activity, thereby demonstrating not only its unlawful animus but also its general knowledge of its janitors' protected activity.[6] Further, the record establishes that the Respondent was aware of each individual discriminatee's protected activity. Nineteen of the 21 discriminatees signed at least one of several group letters to the Respondent concerning their terms of employment. The credited evidence also shows that the only two discriminatees who did not sign such letters, Valentin Estrada and Axel Carmona, actively engaged in Section 7 activity and were directly threatened by Supervisor Arellano.[7]

We also agree with the judge's conclusion that the Respondent's asserted reasons for failing to rehire the discriminatees are inconsistent and pretextual. The Respondent first contends that the discriminatees failed to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of allegations that the Respondent unlawfully withheld employees' vacation pay and that various statements by the Respondent (other than those the judge found unlawful) constituted unlawful threats, solicitations for resignation, or left an impression of surveillance.

[2] We will modify the judge's recommended Order to correct the inadvertent omission of standard make-whole requirements (which are included in his remedial notice). We shall also modify the Order to provide for the posting of the remedial notice in accord *with J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[3] 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under the analytical framework set forth in *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. Once the General Counsel makes that showing by proving the employee's union activity, employer knowledge of the union activity, and employer animus against the employee's protected conduct, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

[5] One unique remedial consideration in an *FES* case involving multiple job applicants is that instatement is limited by the number of available positions the employer actually filled. In this case, however, there is no dispute that the Respondent hired more new employees than the number of alleged discriminatees.

[6] See, e.g., *D&F Industries*, 339 NLRB 618, 622 (2003) (employer's unlawful threat of discharge and closure illustrated both its animus and knowledge of employees' protected activity); see also *North Atlantic Medical Services*, 329 NLRB 85, 85–86 (1999), enfd. 237 F.3d 62 (1st Cir. 2001) (employer's knowledge of protected activity may be inferred from evidence of animus).

[7] We therefore find it unnecessary to rely on *St. John's Community Services—New Jersey*, 355 NLRB 414, 415 fn. 3 (2010), as the judge did.

submit timely applications. As the judge found, however, the Respondent had promised to solicit their applications at the proper time but, contrary to its witnesses' testimony, never did so. Thus, the onus is on the Respondent, not the employees.

The Respondent's second (and inconsistent) argument is that it chose not to rehire most of the discriminatees because they were ineligible to work in the United States due to their immigration status. The Respondent bases its argument solely on "no-match" results from a check of discriminatees' names and social security numbers with the Social Security Administration. The record, however, demonstrates that the Respondent in fact had little actual concern about the discriminatees' immigration status.

Initially, the timing of the social security check belies a genuine concern. When the Respondent was hiring to fulfill the previous year's contract—just a year before the discriminatees here began collectively raising concerns about their working conditions—the Respondent made no effort to check applicants' immigration status. After the discriminatees' protected activity, however, the Respondent ran the social security checks. The Respondent attempts to deflect the obvious implication raised by this sequence of events by claiming that its contract with the school district imposed the social security check requirement. The record demonstrates, however, that there was a similar requirement in the prior year's contract—the only difference was that the Respondent made a point of raising the social security check with the school district and actually conducted the check after the discriminatees had engaged in protected activity.

Moreover, the record contradicts the Respondent's claim that it considered the results of the social security check in deciding not to rehire the discriminatees. Although the social security check on the discriminatees was supposedly run in August 2010, the "no-match" results the Respondent submitted at trial were either undated or dated long after August 2010—that is, after the Respondent made the decision not to rehire the discriminatees. Thus, the Respondent has failed to show that it did, in fact, rely on the "no-match" results.

Even apart from the suspicious timing, the Respondent acknowledged at the hearing its awareness that a "no-match" letter from the Social Security Administration is not conclusive evidence of unlawful immigration status.[8] In fact, even if the Respondent did receive such letters, its apparent lack of concern is indicated by the fact that it did not notify any discriminatee that his immigration status was in question and might affect his prospects of reemployment. It is thus readily apparent, and we so find, that the Respondent's asserted reliance on the "no-match" letters is a pretext.

For all of those reasons, we reject the Respondent's asserted reasons for not rehiring the discriminatees for the 2009–2010 school year.[9] Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act when it refused to rehire the discriminatees.[10]

II. PROPER REMEDY WITH RESPECT TO EMPLOYEE GARCIA

The Acting General Counsel urges us to find that employee Norma Garcia is entitled to a remedy, notwithstanding his failure either to include Garcia in the original complaint or to amend the complaint at any time. The Acting General Counsel relies on *Pergament United*

[8] *Concrete Form Walls, Inc.*, 346 NLRB 831, 835 fn. 20 (2006), enfd. mem. 225 Fed.Appx. 837 (11th Cir. 2007).

[9] The pretextual nature of the Respondent's asserted reasons for not rehiring the discriminatees both confirms the judge's finding that its real motive was the employees' protected activity and precludes the Respondent from showing that it would not have rehired the discriminatees even in the absence of their protected activity. See *Inter-Disciplinary Advantage*, 349 NLRB 480, 506 (2007), and cases cited there; *Austal USA, LLC*, 356 NLRB 363, 364 (2010) (if proffered reason for discharge is pretextual, employer necessarily fails to establish *Wright Line* defense).

[10] At the Acting General Counsel's urging, the judge also found that the Respondent unlawfully refused to consider the discriminatees for rehire, although refusal to consider was not alleged in the complaint. The judge correctly noted, however, that the remedy for refusal-to-consider violations is subsumed within the broader remedy for refusal-to-hire violations where the latter violations are found for the same employees. E.g., *Jobsite Staffing*, 340 NLRB 332, 333 (2003); *Windward Roofing & Construction*, 333 NLRB 658, 659 fn. 2 (2001). Because we agree that the Respondent unlawfully refused to rehire the discriminatees, we need not further address the Acting General Counsel's refusal-to-consider allegations.

The Respondent challenges the inclusion of four individuals—Mairel Blanco, Randolfo Campos, Carla Lopez, and Javier Silva—as discriminatees on the ground that their employment ended prior to the conclusion of the 2008–2009 school year. As the judge noted, the Respondent can pursue this issue in the compliance phase of this proceeding.

With respect to remedial backpay, the Respondent contends that backpay should be reduced for those discriminatees who signed severance agreements in June and July 2009, by the amounts of severance pay those employees received from the Respondent at that time. However, the severance agreements pertained to the discriminatees' employment during the 2008–2009 school year, not to their prospective reemployment during 2009–2010, the school year at issue. The discriminatees' severance pay for 2008–2009 therefore does not constitute interim earnings to be offset against their remedial backpay for the following year.

The Respondent also raises immigration status with respect to some discriminatees' entitlement to backpay. As the judge noted, the Respondent can pursue this issue in compliance to the extent that it has a reasonable basis for doing so, and subject to the limitations set forth in *Flaum Appetizing Corp.*, 357 NLRB 2006 (2011). Member Hayes adheres to the views expressed in his partial dissent in that case.

Sales, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), and *Kenmore Electric Co.*, 355 NLRB 1024, 1029 (2010), holding that the Board may find an unalleged violation if it is closely related to the subject matter of the complaint and has been fully litigated at trial. We reject the Acting General Counsel's request.

The Acting General Counsel cites no authority for applying *Pergament* to grant relief to a previously unnamed discriminatee where, as here: (1) the complaint specifically named individual discriminatees *without* including "with others unknown" or similar catch-all language; (2) the proposed additional discriminatee reasonably should have been known to the Acting General Counsel;[11] and (3) the Acting General Counsel did not seek relief for the additional discriminatee until the case reached the Board. Granting relief to Garcia at this juncture would raise serious due process concerns. Based on those concerns and our precedent, we deny the requested relief.[12]

We need not, however, decide now whether the Acting General Counsel may seek relief for Garcia by issuing a new complaint, predicated on the timely filed unfair labor practice charge in this case and relying on the findings here regarding the Respondent's actions. See generally *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775 (1997) (discussing Board policy disfavoring piecemeal litigation by the General Counsel as "not absolute").[13]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Merchants Building Maintenance LLC, Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b), and reletter the following paragraphs accordingly.

"(b) Make the above-named former employees whole in the manner set forth in the remedy section of this decision, together with interest compounded on a daily basis, for any loss of earnings and other benefits suffered by them as a result of the unlawful refusal to hire them."

2. Substitute the following as paragraph 2(d).

"(d) Within 14 days after service by the Region, post at its Santa Fe, New Mexico facility, copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2009."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[11] The record shows that Garcia was employed by the Respondent during the period at issue, that she engaged in protected activity, and that she was one of the employees unlawfully threatened by Supervisor Arellano.

[12] See, e.g., *Sumo Airlines*, 317 NLRB 383, 384 (1995) (discriminatee could not be added at the exceptions stage to those named in complaint). See also *Stevens Construction*, 350 NLRB 132, 132 fn. 2, 150 fn. 9 (2007) (affirming judge's refusal to permit addition of alleged discriminatees during course of hearing after the General Counsel had rested his case); *Regional Import & Export Trucking*, 292 NLRB 206, 233 (1988), enfd. mem. sub nom. *NLRB v. Teamsters Local 807*, 914 F.2d 244 (3d Cir. 1990) (motion to add a discriminatee after close of hearing denied "in the absence of any unusual circumstances which may have excused the General Counsel's failure to amend the complaint"); *Great Scott Supermarkets, Inc.*, 206 NLRB 447, 447 (1973) (same). Compare *Performance Friction Corp.*, 319 NLRB 859, 859 fn. 3 (1995), affd. in relevant part 117 F.3d 763 (4th Cir. 1997), cert. denied 523 U.S. 1136 (1998) (amendment adding discriminatees was permissible where the possibility of additional discriminatees was first discovered during the hearing and the motion was made before the respondent presented its case).

[13] Member Hayes does not join his colleagues' observations in this paragraph.

WE WILL NOT fail and refuse to hire former employees because they engaged in concerted protected activities.

WE WILL NOT threaten employees with refusal to rehire because they engaged in concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL offer each of the following former employees instatement to the positions for which they would have applied had application opportunities been made available or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges:

Mairel Blanco	Joel Lopez
Randolfo Campos	Juan Lopez
Axel Carmona	Lilian Lopez
Elizabeth Castro	Liliana Lopez
Dario Chavez	Diego Ornelas
Otto Rene Coj	Jose Pichardo
Alma DeLara	Ana Ramirez
Valentin Estrada	David Segovia
Blanca Ibarra	Juan Sican
Carla Lopez	Javier Silva
Bianca (or Blanca) Silva	

WE WILL make the former employees named above whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to rehire them.

WE WILL remove from our files any reference to our unlawful refusal to hire the former employees named above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them or to consider them for hire will not be used against them in any way.

MERCHANTS BUILDING MAINTENANCE LLC

William Mabry, Atty., for the General Counsel.
Thomas A. Lenz, Atty. (Atkinson, Andelson, Loya, Ruud & Romo), of Cerritos, California, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by Elizabeth Castro and Axel Carmona, individuals (respectively, Castro and Carmona), the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued an Order consolidating cases, consolidated complaint and notice of hearing (the complaint) on March 31, 2010. The complaint alleges that Merchants Building Maintenance LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). This matter was tried in Santa Fe, New Mexico, on May 18–21 and August 23–25, 2010.[1]

[1] All dates here are 2009, unless otherwise specified.

II. ISSUES

A. Did the Respondent violate Section 8(a)(1) of the Act by threatening employees with adverse consequences of their protected concerted activities, creating an impression of surveillance of employees' protected concerted activities, and interrogating employees about their protected concerted activities?

B. Did the Respondent violate Section 8(a)(1) of the Act by refusing to pay employees accrued vacation pay?

C. Did the Respondent violate Section 8(a)(1) of the Act by refusing to consider for rehire or to rehire 22 employees because they engaged in protected concerted activities?

III. JURISDICTION

At all relevant times, the Respondent, a California corporation, with an office and place of business in Santa Fe, New Mexico, has been engaged in the business of providing janitorial services. During the 12-month period ending August 27, the Respondent performed services valued in excess of $50,000 in states other than the State of New Mexico. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

IV. FINDINGS OF FACT

Unless otherwise explained, findings of fact here are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

A. The Respondent's Business

The Respondent, whose principal office is located in Monterey Park, California, has janitorial contracts with various school districts throughout the United States. In 2008 the Respondent contracted with the Santa Fe, New Mexico Public School District (School District) to provide janitorial services for 32 school district facilities, including Santa Fe High School and Capital High School (Santa Fe HS and Capital HS, respectively) for the 2008–2009 school year. During the 2008–2009 school year, the Employer employed 14 janitorial employees at Santa Fe HS and 11 at Capital HS (the 2008–2009 employees). For janitorial work at the other 30 school district facilities, the Respondent maintained and administered a subpool of 42 on-call workers (subpool employees). The Respondent maintained an office onsite at the Santa Fe HS. Although some of the Respondent's janitorial contracts provided for vacation pay, its contract with the School District did not. Prior to commencing work on the 2008–2009 contract, Ferrell explained to the 2008–2009 contract employees that they were not entitled to vacation pay.[2]

[2] It is clear from the testimony of employees Valentin Estrada and Ms. Castro, and from the statement as to vacation pay in the June 16 letter, detailed below, that employees understood vacation pay was limited to situations where employees worked a full year.

On June 11 or 12, as the 2008–2009 school year drew to a close, representatives of the School District told Ferrel that because of economic considerations the School District would not utilize the Respondent for summer cleanup projects and that it had not yet determined whether a 2009–2010 school year contract would be offered.

In mid-August, the School District reached agreement with the Respondent to provide janitorial services for the Santa Fe HS and Capital HS for the 2009–2010 school year. The contract with the School Disrict required the Respondent to conduct a criminal background check and to verify with the Social Security Administration (SSA) social security number (SSN) accuracy for each employee.[3] Work pursuant to the terms of the contract commenced on August 26, and on September 2, the Respondent signed the contract. The Respondent employed 11 janitorial workers at each of Santa Fe HS and Capital HS but maintained no subpool and performed no work for the other 30 School District facilities.[4]

At all relevant times, the following individuals held the positions set forth opposite their respective names and were supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:[5]

David Haas (Haas)	-	President
Marco Ferrel (Ferrel))	-	Vice President
Adam Navarrete (Navarrete)	-	Branch Manager
Saul Mendez (Mendez)	-	Manager
Oscar Arellano (Arellano)	-	Supervisor
Kathyrn Mora (Mora)	-	Director of Human Resources
Maria Carrillo (Carrillo)	-	Supervisor
Bianca Silva (Silva)[6]	-	Supervisor, Santa Fe HS, to early December 2008
Jose Martinez	-	Supervisor, Santa Fe HS, early December 2008 to May 2009

B. Concerted Protected Activity

In November, a number of the janitorial employees who worked at Santa Fe HS formed a group they referred to as the "committee" (the committee). On November 25, 2008, and November 26, 2008, 16 of the committee, spearheaded by Silva and assisted by volunteers of the Somos Un Pueblo Unido (Somos), a social service organization, sent letters to Navarrete and Mendez, respectively, demanding "better working conditions and respect for our rights as workers and human beings." Saying that Mendez, to whom they first protested, had done nothing to resolve their concerns, the committee complained, inter alia, that Pete Ibarra, the Santa Fe HS janitorial supervisor employed by the School District, had sexually harassed coworkers and that Arellano had created a difficult, stressful, and disrespectful work environment. The letter noted that a copy had been sent to Mel Morgan, associate superintendent of the School District. The following committee members signed the letter:

Alma de Lara	Carla Lopes	Javier Silva
Randolfo Campos	Juan Lopez[7]	Lillian Lopez[8]
Otto Rene Coj	Juan Sican	DarioChavez
Bianca Silva	Joel Lopez	Jose Pichardo
Elizabeth Castro	Mairel Blanco	Ana Ramirez
Liliana Lopez		

On November 26, 2008, 14 of the above-committee members sent a letter to Mel Morgan, repeating the sexual harassment charges against Pete Ibarra. The committee additionally complained that Mendez had done nothing about the workers' concerns, stating, "Any time we complain to Pete Ibarra, he has threatened to have the contract between the schools and Merchants terminated. Saul Mendez our Manager with Merchants Building has said this is why he cannot address our concerns." The committee asked to meet with Mel Morgan and the assistant directors of the School District's general services department.

When the School District received the employee letters, School District representatives told Navarette that the Company needed to talk to their employees because employment issues should be brought to them rather than to the School District.

Following the November 25 and 26, 2008 letters, several meetings involving employees took place. It is not clear from the testimony the order or the specific dates in which the meetings occurred, and some witnesses evidently misattributed statements made in one meeting to another meeting. The precise meeting dates are not essential to an understanding of what transpired in the meetings. Although witness accounts of what was said at the meetings varied, where not specifically attributed, the summaries set forth constitute a reasonable amalgamation of credible collective testimony.

The First Meeting with Bobby Gutierrez, School District Superintendent

Following the transmission of the November 26, 2008 letter to the School District, in late November or early December 2008, 15–17 members of the committee, including Silva met with Bobby Gutierrez (Gutierrez) to discuss their complaints.

[3] The requirement as to SSN verification was included at the Respondent's suggestion.

[4] In the 2009–2010 school year, the School District employed its own janitorial workers for facilities other than Santa Fe HS and Capital HS.

[5] The Respondent contends that Bianca Silva and Castro were supervisors as defined in Sec. 2(11) of the Act at all relevant times. Bianca Silva was an admitted supervisor within the meaning of the Act until December 2008 when her supervisory duties were assumed by Jose Martinez. There is no evidence that Castro, at any time, had authority to do more than check employees' work and perform other routine oversight duties; I find Castro did not possess 2(11) authority during any relevant period.

[6] Bianca Silva is also known as Blanca Silva.

[7] At the hearing the name appearing in the complaint as "Juanita" Lopez was amended to "Juan Lopez."

[8] The name "Lilian" or "Lillian" Lopez, used here, referes to the same person.

The Second Meeting with Gutierrez

On about December 3, 2008,13–15 of the Respondent's Santa Fe HS employees met again with Gutierrez to complain that the Respondent's supervisors were carrying out reprisals against the employees, accusing them of stealing things from the school and not doing their jobs.

The December 3, 2008 Management Meeting with Employees

On December 3, 2008, Arellano, Navarette, Mendez, and Ferrel met with about 30 of the Respondent's employees at the Santa Fe HS cafeteria. According to employee witnesses, Ferrel, the primary management speaker, said employees should stop sending letters to the School District; if they did not, the Company would lose the contract and employees would lose their jobs.[9]

According to Ferrel, at this meeting he told employees the Respondent would raise their concerns to the School District but could make no demands regarding School District personnel. Ferrel pointed out the School District had the right to cancel the contract since every contract had a termination clause, providing for cancellation for nonperformance or other issues. Ferrel asked the employees to bring their concerns to the Respondent. Navarette testified that because some of the letters had been misdirected, the managers gave employees the correct address and asked them to send letters to the Company, which would handle complaints. The Respondent denied telling employees they could lose their jobs because they were sending letters or that the Company could lose its contract because of the letters.

After the December 3 meeting, by letter dated December 15, 2008, 19 committee members wrote to Haas with a copy to Ferrel, alleging retaliation against committee members for complaining.[10] By letter dated December 31, 2008, 15 committee members wrote to Navarette with a copy to Gutierrez, alleging further retaliation against committee members for complaining and requesting a meeting with company representatives and Gutierrez.

The Early January 2009 Management Meeting with Employees

Arellano, Navarette, Ferrel, and Haas met with about 35 of the Respondent's employees at the Santa Fe HS cafeteria. Ferrel was the primary speaker. The Respondent told the assembled employees that it had raised their concerns with the School District, that Pete Ibarra had been suspended pending investigation. According to employee witnesses, the Company again told employees to stop writing to the School District, as their continued letter-writing endangered any future contract and their jobs.

According to Ferrel, he reminded employees that the Respondent, not the School District, was their employer and that employees could bring their issues to the Company. Ferrel provided employees with management-contact names and a toll-free telephone number, assuring them of confidentiality. Of Silva, Ferrel said, "Bianca's always aggressive and on the defensive, [a] pusher[;] for a lot of questions asked . . . to her, she wouldn't respond." At one point, Haas told her, "I'm trying to talk to you guys and I think I'm being fair with you guys and I think you're being disrespectful."

The June 12, 2009 Management Meeting with Employees

On June 12, Navarette, Ferrel, Mendez, and Arellano met in the Santa Fe HS cafeteria with 40–60 of the Respondent's janitorial employees, including members of the committee. According to employee witnesses, either Navarette or Ferrel told the employees that work would end on June 19 because the Company had lost the contract thanks to a group of employees who had caused problems within the school.[11] When some employees said they were not a part of the group, either Navarrette or Ferrel said the Company knew who was in the group. The Respondent's representatives said that if they got the contract again, they would call the employees back to work. Employee witnesses Castro, Dario Chavez, Alma De Lara, and Lilian Lopez testified essentially that the Respondent said only the subpool employees or employees not involved with the committee would be called back.

Ferrel denied that either he or anyone else from the Respondent vocally blamed the committee for the contract loss at the June 12 meeting. Rather, he testified, noncommittee employees became upset when they learned the Respondent had no contract for the 2009–2010 school year and accused Silva and the committee employees of having caused the contract loss. Ferrel said he told employees they could apply to the School District for one of the school's few direct-hire janitorial positions.

By letter dated June 16, members of the committee wrote to Ferrel, asking him to clear up the following points:

> First point, we were employed the 15th of August of 2008, and we were told that the contract was for a year. Why then were we told that the 19th of June of 2009 was going to be the last day of work? We don't believe that this is just because we are being fired before having been at work for one year. In this manner, we cannot receive paid vacation or sick leave. Paid vacation and sick leave were mentioned and assured and repeated in each meeting because according to you all, your corporation is just to their employees. We were also promised a raise of salary after three months, and we never saw that raise of 75 cents. We want to demand our benefits.
>
> Second point. We want to know if there is some kind of problem with Santa Fe High because Mr. Ferrel only invited the workers of the sub pool to work with the district or in any

[9] Although the precise wording varied, employee witnesses Juan Lopez, Silva, Castro, and Juan Sican, all testified that either Navarette or Ferrel stated, essentially, that continued complaining to the School District would result in a loss of the contract and a consequent loss of jobs.

[10] The letter also dealt with the desired reinstatement of employees Blanca Ibarra and Carla Lopez, concerns not at issue herein.

[11] Although the precise wording varied, employee witnesses Lilian Lopez, Silva, De Lara, and Coj testified that either Navarette or Ferrel stated, essentially, that "problem" or "problematic" or "troublemaker" employees had caused the contract loss.

other open position, but he excluded the workers of Santa Fe High. He never mentioned them at all.

Third point. We're a little confused of why Mr. Oscar Arellano, if he works for Merchants, has to help the workers of the sub pool with their applications to start working with the school district.

Fourth point. The date of termination that was given to us the 12th of June was a surprise. We want to know since when did you know of the date of our last day of work? Why didn't you tell us beforehand? And above all, the day before we had been told that we were only going to rest 15 days to go back to work in the summer.

Sometime after the June 12 meeting, Arellano proffered 1-page documents, which the employees described as letters of resignation, to certain employees to sign. The following employees testified of the encounters as follows: Valentin Estrada (Estrada), said Arellano told him he should sign, so he could get work with the Respondent again; Estrada refused to sign. At a later time, Arellano told Estrada the Respondent would probably get the contract and they needed 30 workers to work during the school break, but he would not employ any of the workers who would not sign the resignation letters. David Segovia also recalled that Arellano said that he would not reemploy any workers who did not sign the letter of resignation. Castro said Arellano told her the document meant her job had ended and that she was fired; Castro refused to sign. Lilian Lopez said Arellano asked her and two coworkers to sign the documents, saying it would not cause any trouble for them; the three refused to sign. De Lara said Arellano said the document was a letter of resignation, but it was okay if employees did not sign because, in any event, they were without work; Alma de Lara refused to sign, as did Dario Chavez. Arellano asked Garcia to sign a letter of resignation just to finish things right because the contract had ended, and her resignation would not affect her in any way; Garcia refused to sign.

The Third Employee Meeting with Bobbie Gutierrez (June 18)

On June 18, 15 members of the committee met with Gutierrez. The employees asked her to intervene with the Respondent so they could get vacation pay. The employees also asked for an explanation of why they had been fired and whether they would get a new contract and be hired back. Gutierrez said she would do whatever she could to see that employees got their jobs again.

Sometime after June 18, Ferrel met with Romero and Gutierrez to discuss the Respondent's bid for the 2009–2010 contract. The two school district officials told Ferrel they had met with employees and Somos, and the group had complained that the Company had not paid vacation or other moneys. Ferrel explained the Respondent's vacation policy to the School District's apparent satisfaction, but Gutierrez and Romero said that if the Respondent hoped to be considered for the 2009–2010 contract, it would be a lot easier if everything was settled with Somos and the employees and there were no pending issues for the new school year. Ferrel thereafter consulted with the Respondent's management team about what could be done to "end on a friendly way." Because the Company "wanted to end it. . . . wanted [the problems] to go away," the management team decided to make severance payments to employees as long as employees signed severance releases.[12]

Final Paycheck Distribution (June 22)

On June 22, Arellano distributed final paychecks, individually or in small groups, to a number of Santa Fe HS and Capitol HS employees in the Santa Fe HS parking lot. The following employees testified of their interactions with Arellano as follows: Lilian Lopez said Arellano told workers he might get the contract again, and he told those who were not members of the committee that he would call them for any future work. Estrada said Arellano said the Respondent would not hire employees who were going around with the other group.[13] Castro said Arellano presented her paycheck, then turned to subpool workers in her presence and told them that he would call them back because they were not part of the troublemaker group. Dario Chavez said Arellano gave him a check and said nothing, but told other employees they would be called back to work because they did not belong to the group that was causing the problem. Norma Garcia, whose testimony was corroborated by Alma De Lara, said Arellano told them that thanks to Somos they wouldn't have work anymore. Otto Coj said Arrellano said he would only call back those who gave no trouble. Juan Sican said that when Arrellano gave him his final check, he said in a loud voice to nearby employees that because of some employee troublemakers the Company had lost the contract and employees had lost their jobs. He added that if the Company was able to regain the contract in the future, they would call those that were not organized.

On June 22, the following members of the committee signed a letter and faxed it to Ferrel. The letter requested a meeting with Ferrel and stated in pertinent part:

> We also want to clear [up] a comment from Oscar Arellano that [the Respondent] was firing us because they wanted to get rid of a group of workers that got together recently for the meeting that we had to resolve some problems in our work . . . . as he was giving checks to all the workers [Mr. Arellano] was telling them in front of us that he was going to call them to work and that the members of our group, he never told us anything. We feel that this is a reprisal because we got together as a group to resolve our labor situation.
>
> | | | |
> |---|---|---|
> | Bianca Silva | JuanLopez | Lillian Lopez |
> | Norma Garcia | Alma de Lara | Otto Rene Coj |
> | Juan Sican | Dario Chavez | David Segovia |
> | Elizabeth Castro | Jose Pichardo | Diego Ornelas |

The Respondent did not answer the letter.

Sometime in early August, pursuant to its decision to give employees a "severance settlement," the Respondent offered various 2008–2009 contract employees $800 if the employee

[12] Employees entitled to the package were those who began employment at the beginning of the contract in August or September 2008 and worked full time to the end of the school year.

[13] It is reasonable to infer that Arellano meant the committee.

signed the following "Release in Full of All Claims" form (release agreement), which stated, in pertinent part:

> For and in consideration of the sum of [$800] receipt of which is acknowledged, I release and forever discharge [the Respondent . . . and the School District] and any and all related third parties from any and all rights, claims, demands of any kind, known or unknown, existing or arising in the future and accordingly do hereby expressly, voluntarily, knowingly and advisedly WAIVE any and all rights granted . . . I understand that this is all the money or consideration I will receive from [the Respondent].

Of employees who signed the release agreements, the following testified: According to Juan Lopez, in August Navarette said the signed agreements would be given to Gutierrez as proof that the Respondent had paid employees their vacation pay, so that the School District would award them the 2009–2010 contract. Navarette said that work was starting on August 14 and that he would call Juan Lopez. Castro said Arellano offered her a check for $800, saying that she had to sign the release form, which was a document she could show the superintendent that the Respondent had paid vacation; if she did not, the Respondent would not give her the check and would not call her back to work. Arellano told Norma Garcia she had to sign the paper to get her vacation check, but she should not worry because the people who had not caused problems were going to be called back to work, as the Company wanted people who would work and not cause problems. Juan Sican said that when Arellano gave him the vacation check, he said he would call the employees to work again. Lilian Lopez said Navarrete told her that if she did not sign the release, she would not get her vacation pay or her job back. Dario Chavez said Arellano called the $800 check a "bonus." Otto Coj testified that Arellano and Mendez required that he sign a form before they gave him a "vacation" check, saying they had to show "the person" that they had given him a check. The two said there was no commitment as to work.[14]

The Respondent's arrangements with Silva, who had been an alleged victim of Pete Ibarra's sexual harassment, were different from the severance settlement. In an attempt to resolve potential liability, the Respondent had paid Silva $10,000 in December 2008 with promise of a later additional $5000.[15] On August 6, Navarette and Mora presented Silva with a document entitled "Agreement and Full Release of All Claims." According to Silva, Navarette told her that unless she signed the agreement she would not get the remaining $5000, and when she signed it, they would take it to the School District and be able to get the contract back. Silva signed the release and received a check for $5000.[16]

During early August, the Respondent conducted informal negotiations with the School District over terms for a 2009–2010 contract. A few days before Ferrel received official word that the contract had been awarded to the Respondent, Silva telephoned Ferrel and asked when the Respondent was planning to tell employees that it had gotten the contract.[17] Ferrel said he had heard nothing official, but the Company would "invite" everyone to apply and asked Silva to give him the cell phone numbers of the employees. Silva said she would make sure that "everybody [was] there."[18]

On August 6,[19] the employees who had been employed at the Santa Fe HS during the 2008–2009 contract were present in a conference room at Somos when Silva conducted a speakerphone conference call with Navarette. Silva told Navarette, "I'm just calling for you to tell me when we're going to go back to work." Navarette said that either Mendez or Arellano would be calling the employees before the 15th of August.

On August 11, members of the committee faxed to Haas and Arellano a letter stating, in pertinent part:

> Firstly, we want to thank you for having promised our job again the 6th of August because of our good work. We are waiting for your call to go back to work. Mr. Oscar Arellano had just said the 11th of August that he is not going to give us the contract again and that he is only going to contact those who had not caused problems, that he wanted people that wanted to work and not make problems.[20] We believe that they never had any problems or complaints about our work, and this type of comment worries us because we don't want any reprisals for having complained in the past about our

[14] There is no evidence the Respondent made severance/vacation payments to Carmona, Blanca Ibarra, David Segovia, Estrada, Alma De Lara, Mairel Blanco, Randolfo Campos, Joel Hernandez, Carla Lopez, Joel Lopez, Liliana Lopez, Diego Ornelas, or Ana Ramirez.

[15] The Respondent also paid Blanca Ibarra $5000 in compensation for Pete Ibarra's alleged conduct.

[16] In pertinent part the agreement stated that Bianca Silva "voluntarily release[d] . . . [the Respondent] from any and all liability, claims . . . and damages of any kind . . . related to [her] employment with [the Respondent]." The agreement also contained the following sentence: "My resignation of employment with [the Respondent] was effective on June 19, 2009. I agree not to seek future employment with [the Respondent." When Silva objected to this resignation language, Mora crossed it through and added the following: "Blanca Silva is not resigning her employment with [the Respondent]," which both Mora and Navarette initialed. Silva signed the agreement with its addendum.

[17] It is unclear when this conversation occurred, but it is probable that it took place shortly before the speakerphone conversation of August 6, described in the next paragraph.

[18] Silva acknowledged that after she learned the Respondent had been awarded the 2009–2010 contract, she telephoned Navarette and told him she would talk to her coworkers about returning to work. I do not, however, credit Ferrel's testimony that Silva told him she would fax him a list of employees with their current telephone numbers. Although Ferrel so testified in his initial testimony, he did not repeat the assertion when he took the stand some weeks later, testifying, as set forth, that Silva declined to give him the cell phone numbers of employees, saying he should not worry about that, as she would ensure "everybody [was] there." Further, I do not infer from Ferrel or Silva's testimony that Silva intended to, or that errel believed she had, released the Respondent from its managers' promises to notify or to "invite" the 2008–2009 employees to apply for the 2009–2010 contract work, or that, as the Respondent argues, she "assured [the Respondent] that she would take responsibility for contacting the 08/09 janitors about seeking employment in 09/10."

[19] This date is based on the reference to the conversation in the August 11 letter described below.

[20] No evidence was adduced as to what, if anything, Arellano may have said to employees on August 11 about not contacting perceived troublemakers.

> terms and condition of our work. We . . . consider ourselves loyal and good workers. We are still very worried about some of our coworkers who have not received their paid vacations for their year of work Please call us to tell us what is going to happen to this.

The Respondent did not respond to the August 11 letter.

C. The 2009–2010 School Year Hiring

During the August 2009–2010 contract discussions between the School District and the Respondent, it was determined that the contract would provide for 13 janitorial employees for Santa Fe HS and 10 janitorial employees for Capital HS. Mora suggested the contract include a provision requiring SSN verification as a part of prospective employee background checks.[21]

In early August in preparation for a possible contract, the Respondent began employee recruitment, arranging for radio and newspaper employment advertisements and posting help-wanted notices at the Albuquerque and Santa Fe unemployment offices. On August 18, Mora sent Romero an email informing him as follows:

> Merchants Building Maintenance will conduct a criminal background check [as a condition of employment] for all Santa Fe School District locations. The background will include the following:
>
> Sex Offender Search
> National Criminal Database Search
> Social Security Verification
> Affirmation of Legal Work Status Acknowledgement

Sometime between early to mid August, the Respondent undertook to verify the Social Security Number (SSN) of a number of the 2008–2009 employees.[22] The Respondent arranged with a background-check Company, Et All Inc. (Et All), to provide SSN verifications for the 2008–2009 employees. The verification procedure consisted of checking with the SSA that the given SSN matched SSA data for name and date of birth. Of the 22 alleged discriminatees, Et All did not report to the Respondent on the validity of the SSNs of Carmona, Joel Hernandez, Blanca Ibarra, and Juan Lopez. Et All reported that the SSNs of Estrada, Jose Pichardo, and Bianca Silva were valid. The Respondent submitted into evidence 22 consent-based SSN verification certifications provided to the Respondent by Et All as follows (names distinguished by an asterisk are those of alleged discriminatees):

Employee Name	*Date of Certification*[23]	*Result*
*Mairel Blanco	undated	no match
*Randolfo Campos	undated	no match
*Elizabeth Castro	undated	no match
*Dario Chavez[24]	undated	invalid number
*Otto Cojo[25]	undated	no match
*Alma Delara	undated	no match
*Valentin Estrada	May 13, 2010	data match
Maria Frech	March 26, 2010	data match
Martin Garcia	March 26, 2010	data match
*Carla Lopez	undated	no match
*Joel Lopez	February 19, 2010	no match
*Lilian Lopez	undated	no match
*Liliana Lopez	undated	no match
*Diego Ornelas	undated	no match
*Jose Pichardo	undated	data match
*Anna Ramirez	undated	no match
Jessica Reynolds	March 26, 2010	data match
*David Segovia	February 19, 2010	no match
*Juan Sican	undated	no match
*Blanca Silva	undated	data match
*Javier Silva	undated	no match
Juan Silva	undated	no match

Mora acknowledged that a name/SSN failure-to-match did not mean the subject individual did not have a valid SSN but was only an indication the individual should visit a social security office to resolve inaccuracies. After receiving Et All's unmatched-SSN notifications, the Respondent did no further investigation of SSN validity of the subject individuals and did not notify any individual that a problem with SSN verification existed.

According to the Respondent's witnesses, sometime between August 13 and 18, Respondent's supervisors, including Mendez and Arellano, tried to telephone each of the 2008–2009 employees using telephone numbers from company records to tell them they could apply for work for the 2009–2010 school year. Mendez testified that "some" of the numbers were noncurrent. The Respondent kept no record of the dates or circumstances of attempted but unsuccessful contacts. No evidence was presented that the Respondent contacted any former employee except Estrada, whom Mendez telephoned less than a week before September 3, telling him he could apply for work with the Respondent. Various 2008–2009 employees testified that in August their telephone numbers were unchanged from the numbers they had provided to the Respondent during their employment, but they never received a telephone call or any other invitation to return to work under the 2009–2010 contract. Had they been contacted, they would have applied and worked. The employees included Lilian Lopez, Alma De Lara, Otto Coj, Silva, Blanca Ibarra, and Carmona.

In August, the Respondent accepted employment applications and offered employment to those who passed the Compa-

[21] The Respondent had not verified SSNs of the 2008–2009 employees. Although Mora's testimony vacillated between accepting credit or blaming the School District for the new 2009–2010 SSN verification procedure, she finally admitted that "[i]t was possibly a suggestion that I made to them." Romero testified that SSN verification was never a School District condition precedent to the 2009–2010 contract, saying, "[I]t did not make any difference to me. I needed basically bodies to clean the facilities . . . if Merchants was going to get the contract [SSN verification] was their responsibility, not ours."

[22] According to Mora, the Respondent sought preapplication SSN verifications to save time in the event former employees applied for employment, but the evidence as to when verifications were sought is either confusing or inconsistent.

[23] Most of the following certifications are undated. Mora testified that when she sent bulk requests for verifications, the resultant certifications were undated. Mora could provide no explanation as to why six of the certifications were dated several months after August.

[24] The SSN given for Dario Chavez was facially invalid.

[25] Otto Coj is the accurate name for this employee.

ny's background check, the Respondent's only employment criteria. Although the Respondent rehired four former School District employees for the 2009–2010 school year—two at Santa Fe HS and two at Capital HS—none of the 22 alleged discriminatees was rehired.[26] Estrada submitted a written application dated September 3 at the Respondent's Santa Fe HS office and was told that if the Respondent had vacancies, he would be called. Estrada received no call.[27] Of the 22 alleged discriminatees, only Estrada applied for reemployment.

When classes began in the School District in August, Carmona[28] spoke with Arellano by telephone. Arellano told Carmona that because he had worked with the group of troublemakers, he would not be able to return to work. Blanca Ibarra did not apply for work because Arellano had said he would call employees. Blanca Ibarra telephoned Arellano and left messages, but Arellano never returned her calls.

D. Credibility

The Respondent presented testimony from Ferrel and Navarette that allegedly bears on the credibility of employee witnesses. Ferrel testified that during the hearing in May while waiting outside the hearing room, he overheard a man he believed to be David Segovia say, "What am I doing here? I am wasting my time. You guys said this was going to be over in a day."

The man to whom the presumed-David Segovia spoke replied, "Let's stick together; we came this far, let's stick to the story. Let's just say what we have."[29] Ferrel acknowledged that he did not hear anyone talk about truthfulness or untruthfulness.

Navarette testified that during the hearing in May while waiting outside the hearing room, he overheard some unidentified persons say they didn't want to lie; they didn't want to fool anyone. Navarette then overheard someone say that nobody could back out, that they had to "take it down to the last consequences of this."

The Respondent asks me to infer from Ferrel and Navarette's accounts that at least some of the employee witnesses conspired to give false testimony and/or that some employee witnesses urged others to stick to false testimony. Ferrel and Navarette's testimonies in this regard are vague and lack context, which prevents me from drawing the requested inference. Further, no reasonable construction of the overheard statements shows any intent to give false testimony. The most suspicious statement—"let's stick to the story"—is just as susceptible of an innocent inference (let's stick to the [truthful] story) as it is to a guilty one (let's stick to the [false] story). I cannot, therefore, infer from Ferrel and Navarette's testimonies that any employee witness testimony was incredible.

As to statements made in the early December 2008 and early January management meetings with employees, employee witnesses ascribed to Ferrel threats that if employees did not stop sending letters to the School District, the Company would lose the contract and employees would lose their jobs. Ferrel, in contrast, said he merely pointed out that the School District had the right to cancel the contract, implying that it might do so if beleaguered by complaints, and asked employees to bring their concerns directly to the Respondent. None of the employee witnesses provided comprehensive testimony of what was said at the meetings. Rather, they testified to conclusionary summaries of what was allegedly said. It is impossible to determine whether the employees' testimonies are clear recollections of what was said or whether they reflect inferences perhaps unwarrantedly drawn. Therefore, as to the early December 2008 and early January management meetings, I credit Ferrel's testimony, which I found to be detailed and straightforward. I cannot, therefore, find that management did other than encourage employees to direct their complaints to the Respondent.[30]

Regarding the June 12 management meeting with employees, employee witnesses testified that either Navarette or Ferrel told employees the Company had lost the contract thanks to a group of employees who had caused problems within the school and that the Company would not recall employee-members of the committee if it procured a future contract. Ferrel denied any manager blamed the committee for the contract loss, ascribing such accusations to other employees. In determining which account to credit, I note that in the June 16 letter to Ferrel, the committee addressed a number of concerns generated by the June 12 meeting, including vacation pay, sick leave, a promised raise, and exclusion of the Santa Fe HS employees from an invitation to apply for School District work. The letter said nothing about management blaming committee members for the contract loss or threatening a refusal to recall. Had the employee-witnesses believed management had made any such statements during the June 12 meeting, it is reasonable to expect they would have detailed both the accusation and the threat in the June 16 letter. Since the letter fails to corroborate employee testimony, I credit Ferrel's account of what was said at the June 12 meeting.

During the final paycheck distribution on June 22, according to employee witnesses, Arellano told workers, essentially, that

[26] The four included Juan Hernandez, formerly employed at Santa Fe HS and Jose Queliz and Biden Sican, formerly employed at Capital HS.

[27] The Respondent never explained why, although vacancies later occurred, it never called Estrada. The Respondent also did not explain why Estrada's SSN verification certification was dated May 13, 2010, long after Mendez' phone call and Estrada's application.

[28] Although Axel Carmona did not sign any committee letters, he supported the committee and attended committee meetings.

[29] Ferrel initially testified that an unnamed man said, "Let's stick to the story." When further pressed, he said he believed the speaker was Silva and another lady, who said, "Let's just stick to the story, let's just stay here, we came this far, just stick to your story."

[30] The General Counsel has not alleged managerial statements made in the December 2008 and January meetings to be violations of the Act. The statements are addressed here as they bear on the Respondent's alleged animosity toward employees' protected activities. Although in the meetings the Respondent expressed a clear preference that employees communicate with the Company rather than the School District, based on the credited testimony I cannot find that the Respondent threatened employees or otherwise demonstrated animosity. See *Buck Brown Contracting Co.*, 283 NLRB 488 (1987) (statement of possible third-party action that did not intimate the employer would forfeit its contract as punishment for its employees' protected activities is statement of opinion, not threat of reprisal, and is protected by Sec. 8(c) of the Act.

he would not call problem or troublemaking committee members or supportive employees for any future work. I found the employee witnesses who testified to Arellano's June 22 statements to be clear, specific, and consistent in their recall. Moreover, on that same day, the committee faxed a letter to Ferrel in which they accused Arellano of telling employees the Company wanted to rid itself of workers who had tried to resolve work problems and of telling noncommittee employees, to the exclusion of committee employees and supporters, that he would recall them to work. The contemporaneous committee letter to the Respondent is essentially consistent with employee testimony; accordingly, where Arellano's testimony differs with that of employee witnesses as to his June 22 statements, I credit the employee witnesses.

With regard to the attempted recall of 2008–2009 employees, I cannot credit Respondent-witnesses' testimony that in August company supervisors including Mendez and Carrillo attempted to contact former 2008–2009 employees to invite them to apply for work. Mendez, who testified that he and Carrillo telephoned former employees, testified not only vaguely but appeared hesitant to answer some questions:

> Q. . . . you tried to call all the employees [from the previous school year]?
>
> A. Correct.
>
> Q. . . . How did you keep track of the people that you called?
>
> A. We [kept] track, with you know, we have a list in those timesheets . . . with their names and everything, but . . . we no have current phone numbers, so we can't reach everybody.
>
> Q. . . . Okay. So did you mark on this list that you couldn't reach—
>
> A. Not really checkmark, but you know, we call[ed] everybody.
>
> . . . .
>
> JUDGE: You didn't make a checkmark or a notation that you left a message to call—
>
> A. Not really.
>
> Judge: —or anything like that?
>
> A. Not really.
>
> Judge: Not really. What does not really mean?
>
> A. Well, no.

The Respondent was unable to provide any record whatsoever of any employee contact attempts. The lack of any documentation, in a situation where documentation could reasonably be expected, reflects badly on the credibility of Mendez. Further, Respondent-witnesses testified the Company was unable to contact any of the former employees, an assertion that is so inherently improbable as to be not only unbelievable but to cast doubt on related testimony. Finally, unrefuted evidence was presented that many of the 2008–2009 employees had, during their employment, furnished the Respondent with telephone numbers that were still in service in August, but those employees were never contacted by Respondent about 2009–2010 work. Moreover, the evidence was confused and inconsistent as to why and when the Respondent sought SSN verifications of the 2008–2009 employees. Accordingly, I find no credible evidence the Respondent attempted to notify any of the 2008–2009 employees, except Estrada, that work was available under the 2009–2010 contract.

V. DISCUSSION

A. Employees' Concerted Protected Activity

Section 7 of the Act provides that employees have the right to engage in concerted protected activities. Section 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

There is no dispute that employees who signed the various 2008 and 2009 letters or who otherwise supported the activities of the committee were engaged in the concerted protected activity of protesting work-related issues to the Respondent. The complaint alleges that in response to that protected activity, the Respondent engaged in unlawful conduct as discussed below.

B. June 12 (Alleged Threats and Impression of Surveillance)

The complaint alleges that through Ferrel and Navarette, the Respondent threatened employees and created an impression of surveillance on June 12. The credible evidence shows that on June 12, during a management meeting with employees, noncommittee employees accused committee members of having caused the Respondent to lose its contract with the School District. There is no credible evidence that any representative of the Respondent made such accusations or adopted employee accusations or otherwise threatened employees. There is no evidence any representative of the Respondent created an impression of surveillance. I shall therefore dismiss allegations of the complaint relating to unlawful conduct on June 12.

C. Sometime in June (Resignation Solicitations)

The complaint alleges that sometime in June by Arellano's solicitation of resignations, the Respondent threatened employees with discharge because they had engaged in concerted activities. There is no dispute that the School District terminated the 2008–2009 contract in June. The evidence showed that thereafter, sometime after the June 12 meeting, Arellano sought to have employees sign resignations. Although Mr. Arellano told employees, variously, that they had to sign the resignation in order to procure work again, he also said the resignation meant the job had ended, which in fact it had, and that the resignation was "just to finish things right" because the contract had ended. He told other employees the resignation would not affect them in any way but whether or not employees signed, they were without work. There is no evidence the solicitations were prompted by invidious considerations or were discriminatorily limited to employees who had engaged in concerted protected activities. In these circumstances, the resignation solicitations did not constitute interference, restraint, or coercion. I shall therefore dismiss allegations of the complaint relating to the solicitation of resignations.

D. June 22 (Threats of Refusal to Rehire)

The complaint alleges that on June 22 through Arellano, the Respondent threatened employees by telling them they would

not be rehired for the following school year because they had engaged in concerted protected activities. I have credited employee testimony that on June 22, while distributing final paychecks, Arellano threatened employees by variously stating or implying that he would not call those who had engaged in concerted protected activities for any future work but would only call back those who gave no trouble or were not organized. Arrellano also told employees that because of some employee troublemakers the Company had lost the contract and employees had lost their jobs. Arellano's statements were declarations of animosity toward employees' protected activities and threats of reprisal that could be expected to interfere, restrain, or coerce employees in the exercise of their Section 7 rights. Accordingly I find that Arellano's June 22 statements to employees violated Section 8(a)(1) of the Act.

E. August (Statement to Axel Carmona)

Sometime in August after the 2009–2010 school year began, Arellano told Axel Carmona that because he had worked with the group of troublemakers, he would not be able to return to work. Arellano's assertion of discriminatory motive in refusing to rehire Alex Carmona violated Section 8(a)(1) of the Act.

F. Refusal to Pay Accrued Vacation Pay

The complaint alleges that since August 3, the Respondent has refused to pay its employees accrued vacation pay. Prior to commencing work on the 2008–2009 contract, Ferrell explained to the 2008–2009 employees that they were not entitled to vacation pay. Although employees apparently thought they were entitled to vacation pay and referred to the August "severance" settlements as "vacation pay," no evidence was presented that such a benefit existed for employees who worked less than a full year (12 months). The Respondent's employees at the School District did not work a full 12 months and were not entitled to vacation pay. I shall therefore dismiss allegations of the complaint relating to any refusal to pay accrued vacation benefits.

G. Refusal to Consider for Rehire and/or to Rehire Employees

The Board set forth its analytical framework for determining whether an employer violates the Act by failing or refusing to consider or hire job applicants because of their protected activities in *FES*.[31] The *FES* burdens of proof are based on those established in *Wright Line*[32] for all cases alleging violations of Section 8(a)(1) turning on employer motivation. Under the *Wright Line* allocation of burdens, the General Counsel must first show, in pertinent part, the following: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that animus toward protected activity contributed to the decision not to hire the applicants. Once the General Counsel establishes these elements by a preponderance of the evidence, the burden shifts to the respondent to show that it would have taken the same action even in the absence of protected activity. If the General Counsel meets the burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of concerted protected activity, then a violation of Section 8(a)(1) has been established.

The General Counsel alleges that the Respondent discriminatorily failed and refused to hire the following 22 employees for the 2009–2010 school year because the employees engaged in protected activities and/or to discourage other employees from engaging in protected activities. I also consider whether the Respondent discriminatorily failed and refused to consider the same employees for rehire:[33]

Mairel Blanco[34]	Joel Lopez
Randolfo Campos[35]	Juan Lopez
Axel Carmona	Lilian Lopez
Elizabeth Castro	Liliana Lopez
Dario Chavez	Diego Ornelas[36]
Otto Rene Coj	Jose Pichardo
Alma DeLara	Ana Ramirez
Valentin Estrada	David Segovia
Joel Hernandez[37]	Juan Sican
Blanca Ibarra	Bianca (or Blanca) Silva
Carla Lopez[38]	Javier Silva[39]

[31] 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

[32] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[33] Although the complaint does not allege the Respondent violated the Act by refusing to consider employees for rehire, the General Counsel in his posthearing brief requests such a finding. I may address the matter even if no allegation exists, if the issue has been fully and fairly litigated. *Kenmor Electric Co.*, 355 NLRB 1024, 1030 (2010), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990) ("Board may find and remedy unfair labor practice not specifically alleged in the complaint if issue is closely connected to the subject matter of the complaint and has been fully litigated."). See also *Letter Carriers Local 3825*, 333 NLRB 343 fn. 3 (2001); *Parts Depot*, 332 NLRB 733 fn 5 (2000). The refusal-to-consider and refusal-to-rehire issues rest on the same evidence and have been fully and fairly litigated. Therefore, I include refusal to consider in the discussion of violations here.

[34] The Respondent stated that its employment records show Mairel Blanco's last check was dated April 2, 2009. Respondent did not explain why, if Mairel Blanco was not employed in June, it sought SSN verification for that employee in August.

[35] The Respondent contends that Randolfo Campos was not employed at any time material to the issues here. Respondent did not explain why, if Randolfo Campos was not employed in June, it sought SSN verification for that employee in August.

[36] When the hearing commenced in May 2010, Jose Pichardo and Diego Ornelas were present at the hearing site and available to give testimony. Upon the hearing's resumption in August 2010, counsel for the General Counsel stated that he was no longer able to locate the two alleged discriminatees.

[37] The Respondent contends it never employed Joel Hernandez. The Respondent did not seek SSN verification for that individual.

[38] The Respondent said its employment records show Carla Lopez' last check was dated September 24, 2008. Respondent did not explain

All of the above employees except Carmona, Estrada, Blanca Ibarra, and Joel Hernandez signed the November 25 and/or June 22 letters. The Respondent does not dispute that participation in generating and tendering the letters constituted concerted protected activity, However, the Respondent argues that the General Counsel must prove that each alleged discriminatee engaged in the protected activity, which, the Respondent asserts, the General Counsel has not done. Under the Board's test in *Wright Line*, where employer action against employees is based on protected group activity known to the employer, the General Counsel is not required to prove specific individual employee engagement in the protected concerted activity. *St. John's Community Services—New Jersey*, 355 NLRB 414 fn. 3 (2010).[40] As for those employees who did not sign the letters, the following evidence was adduced: Arellano directly told Carmona that he could not work for the Respondent because of his association with the committee. Mr. Estrada was actively involved with the committee; he submitted a written application for employment dated September 3 to the Respondent at the Respondent's Santa Fe HS office, to which the Respondent inexplicably did not respond. It is reasonable to infer from the Respondent's silence that it was aware of, or suspected, Estrada's committee sympathies. Blanca Ibarra was known to the Respondent to be an alleged victim of Pete Ibarra and therefore significantly involved with employees' protected protest. As for Joel Hernandez, the General Counsel has provided no evidence that the Respondent ever employed any individual by that name at the School District.[41]

The evidence establishing the first *FES* element that the General Counsel must prove is undisputed: in August, as soon as the Respondent learned it had obtained the School District contract, the Respondent set about hiring 23 janitorial employees to meet contract requirements. The Respondent was, therefore, hiring at the time of the alleged unlawful conduct.

As to the second element, although it is clear that all of the Respondent's 2008–2009 employees, into which category the alleged discriminatees fell, had the necessary experience or training for the job openings, the Respondent contends that none of the discriminatees applied for work, thereby not meeting the job requirement that former employees had to reapply.[42] As to this contention, the evidence is clear that the Respondent repeatedly promised former employees it would notify them if and when work under a 2009–2010 contract came available. Just days before work at the School District resumed under the 2009–2010 contract, Ferrel assured Silva the Company would "invite" everyone to apply. Later, in a speakerphone call with numerous former employees, Navarette said that either Mendez or Arellano would be calling the employees before August 15. I have found no credible evidence that the Respondent attempted to notify any of the 2008–2009 employees, except Estrada, of available work under the 2009–2010 contract, and Estrada was never employed. Consequently, I infer that neither the promised invitation to apply nor the promised work notification was ever communicated to the former employees or that the Respondent had any intention of hiring any of them had they applied. The Board does not require actual application when applying would be futile.[43] Here, not only would application be demonstrably futile, as evidenced by the Respondent's failure to respond to Estrada's application, any failure to apply must be attributed to the Respondent's misleading assurances. Employees who relied upon the assurances cannot be penalized for their misplaced trust. I find, therefore, the General Counsel has met his burden as to the second element.

As to the third element—that animus toward protected activity contributed to the decision not to consider for hire or to hire the applicants—I have already found the Respondent attributed the contract loss to complaining employees and threatened employees they would not be rehired for the following school year because they had engaged in concerted activities. The attribution and the threats are compelling evidence of the Respondent's animosity toward employees' protected activities and its intent to effect reprisals. Further, the attribution and the threats directly link the employees' protected conduct with the Respondent's failure to contact them about work availability or to offer them reemployment. Accordingly, I find the General Counsel has met all three elements of his burden under *FES*, and the burden consequently shifts to the Respondent to show it would have taken the same action even in the absence of protected activity.

Employees employed by the Respondent as of June 12 when the Respondent notified employees that its contract with the School District had ended were entitled to be considered for hire and to be rehired. The Respondent neither rehired any of the discriminatees nor considered them for hire. For the reasons set forth above, the Respondent has not demonstrated that it would have taken the same action in the absence of the alleged discriminatees' protected activity. I must, therefore, conclude that Respondent has not met its burden under *FES* and that it violated Section 8(a)(3) and (1) by refusing to consider

why, if Carla Lopez was not employed in June, it sought SSN verification for that employee in August.

[39] According to the Respondent's witnesses, sometime in January, following an altercation with his supervisor, Javier Silva did not return to work. Respondent did not explain why, if Javier Silva was not employed in June, it sought SSN verification for that employee in August.

[40] The Respondent also argues that activity instigated by supervisors (i.e., Silva and Castro) does not warrant Sec. 7 protection. The Respondent provides no legal support for this proposition. In any event, there is no evidence Castro was a supervisor within the meaning of the Act at any material time, and Silva's supervisory status ended in December 2008. She was, therefore, an employee within the meaning of the Act at the time of the Respondent's unfair labor practices.

[41] While a job applicant is an "employee" under Sec. 2(3) of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), no evidence was adduced that Joel Hernandez ever applied for employment with the Respondent.

[42] There is no evidence that reapplying was not a valid prerequisite of employment. Cf. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006). (Where an employer imposes a consistently applied condition of employment, the General Counsel then has the burden to demonstrate that alleged discriminatees met that requirement.).

[43] In re *Corporate Interiors, Inc*., 340 NLRB 732, 750 (2003).

for hire and refusing to hire the following employees, employed as of June 12:

Mairel Blanco	Juan Lopez
Randolfo Campos	Lilian Lopez
Axel Carmona	Liliana Lopez
Elizabeth Castro	Diego Ornelas
Dario Chavez	Jose Pichardo
Otto Rene Coj	Ana Ramirez
Alma DeLara	David Segovia
Valentin Estrada	Juan Sican
Blanca Ibarra	Bianca (or Blanca) Silva
Carla Lopez	Javier Silva[44]
Joel Lopez	

CONCLUSIONS OF LAW

1. Merchants Building Maintenance LLC is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Merchants Building Maintenance LLC violated Section 8(a)(1) of the Act by:

(a) Threatening employees with adverse consequences, including refusal to rehire, because they engaged in concerted protected activities.

(b) Failing and refusing to consider for hire or to hire the following former employees because they engaged in concerted protected activities:

Mairel Blanco	Joel Lopez
Randolfo Campos	Juan Lopez
Axel Carmona	Lilian Lopez
Elizabeth Castro	Liliana Lopez
Dario Chavez	Diego Ornelas
Otto Rene Coj	Jose Pichardo
Alma DeLara	Ana Ramirez
Valentin Estrada	David Segovia
Blanca Ibarra	Juan Sican
Carla Lopez	Bianca (or Blanca) Silva
Javier Silva	

The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully refused to consider for hire or to hire the above-named former employees, it must offer them immediate and full instatement to the positions for which they would have applied had application opportunities been made available or, if those positions no longer exist, to substantially equivalent positions. Respondent must also make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of refusal to hire to date of proper offer of instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded on a daily basis, as prescribed by *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).[45]

Citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), and *Domsey Trading Corp.*, 351 NLRB 824 (2007). The Respondent argues that if any of the alleged discriminatees cannot be legally employed in the United States, no remedy should be provided for them. The Respondent failed to show that the discriminatees were undocumented workers or that the Respondent refused to rehire them for that reason. Many of the alleged discriminatees' SSNs did not, apparently, match the names given to the Respondent. However, the mismatches may reflect nothing more than name-inaccuracies. The Respondent's evidence, at most, shows the employees provided inaccurate SSNs for some reason. If the Respondent has evidence bearing on discriminatees' immigration status that was unavailable at the time of its unfair labor practices, the Respondent may argue, under the holding of *Hoffman Plastics*, supra, that it should not be precluded from introducing such additional evidence at any compliance stage for the limited purpose of reducing its backpay liability. See *Concrete Form Walls, Inc.*, 346 NLRB 831 (2006).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[46]

ORDER

The Respondent, Merchants Building Maintenance LLC, Santa Fe, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with adverse consequences, including refusal to rehire, because they engaged in concerted protected activities.

(b) Failing and refusing to consider for hire or to hire former employees on the basis of their concerted protected activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[44] I do not find that Joel Hernandez was a discriminatee here. The General Counsel has not met his burden of showing that Joel Hernandez was ever the Respondent's employee or job applicant. However, in light of the Respondent's August SSN verifications, the evidence is not clear as to whether Mairel Blanco, Randolfo Campos, Carla Lopez, and Javier Silva were or were not employed by the Respondent on June 12. The Respondent may proffer additional evidence as to their employment status during any future compliance proceedings.

[45] When, as here, both refusal-to-hire and refusal-to-consider violations are found regarding the same applicants, "the refusal-to-consider violation is subsumed by the broader refusal-to hire remedy." *Jobsite Staffing & Jobsite Personnel, Inc.*, 340 NLRB 332, 333 (2003).

[46] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, insofar as it has not already done so, offer each of the following former employees instatement to the positions for which they would have applied had application opportunities been made available or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges, or, if such is impracticable, otherwise institute such remedial relief as determined appropriate at the compliance stage of the proceeding:

Mairel Blanco	Joel Lopez
Randolfo Campos	Juan Lopez
Axel Carmona	Lilian Lopez
Elizabeth Castro	Liliana Lopez
Dario Chavez	Diego Ornelas
Otto Rene Coj	Jose Pichardo
Alma DeLara	Ana Ramirez
Valentin Estrada	David Segovia
Blanca Ibarra	Juan Sican
Carla Lopez	Bianca (or Blanca) Silva
Javier Silva	

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire the former employees named in paragraph 2(a) above and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them or to consider them for hire will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its office in Santa Fe, New Mexico, copies of the attached notice marked "Appendix"[47] in English and in Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the operations involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 2009.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[47] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."